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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC WAYNE MILLER,

Defendant and Appellant.

C045624

(Super. Ct. No. CM016057)

Defendant appeals from the sentence imposed following his convictions for transportation of a controlled substance (Health & Saf. Code, § 11379, subd. (a) -- count 1) and possession for sale of methamphetamine (Health & Saf. Code, § 11378 -- count 2). He contends the trial court should have stayed his sentence on count 2 under Penal Code section 654, that the imposition of various fines violated the ex post facto clause of the state and federal Constitutions, that if the sentence on count 2 is stayed under Penal Code section 654 only one fine can be imposed, and that the abstract of judgment should be amended. The People properly concede each of these arguments and we accept these concessions. In supplemental briefing, defendant contends the

imposition of the upper term on count 1 violates *Blakely v. Washington* (2004) 542 U.S. ____ [159 L.Ed.2d 403] (*Blakely*). On this point, we are not persuaded.

FACTUAL AND PROCEDURAL BACKGROUND

Because of the nature of the issues on this appeal, only a brief recitation of the facts is necessary. Defendant's vehicle was stopped by Oroville police officers. During a search, officers found a vial containing methamphetamine, a black canister and a pipe in defendant's pockets. A search of defendant's car revealed a cell phone, money and nine separate bindles of methamphetamine, ranging from 0.018 grams to 3.66 grams, as well as a small notebook with notations consistent with sales.

Defendant was charged with transportation of a controlled substance (count 1) and possession for sale of methamphetamine (count 2). It was also alleged defendant had suffered a prior conviction for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)) and had not remained free of prison for five years (Pen. Code, § 667.5, subd. (b)). Finally, it was alleged that defendant had two prior drug-related convictions. (Health & Saf. Code, § 11370.2, subd. (c).) Following a bifurcated trial, a jury found defendant guilty of the transportation and possession for sale charges. The court then found the prior prison term and prior drug conviction allegations true.

Defendant was sentenced to the upper term of four years on count 1, and a concurrent upper term of three years on count 2. In addition, the trial court added the enhancement of one year for the prior prison term finding, and three years each for the two prior drug-related convictions, for an aggregate term of 11 years in state prison. In sentencing defendant to the upper term, the court specifically relied upon defendant's prior conviction record as a factor in aggravation.

DISCUSSION

I

Defendant contends the trial court should have stayed his sentence on count 2 for possession for sale of methamphetamine under Penal Code section 654. The People properly concede this point. (See *People v. Latimer* (1993) 5 Cal.4th 1203.) Defendant also contends that if we stay the sentence for possession for sale, we should also stay the fines imposed in connection with that conviction. The laboratory fees and the drug program fees were doubled as a result of the two convictions. The People properly concede this point.

We accept both of these concessions and shall order the sentence for count 2, possession for sale, stayed. In addition, we order the criminal laboratory analysis fees (Health & Saf. Code, § 11372.5, subd. (a)) of \$170 stayed, and \$510 of the drug program fees (Health & Saf. Code, § 11372.7, subd. (a)) stayed.

II

Defendant next contends the fines imposed pursuant to Penal Code section 1465.7 and Government Code section 70372, subdivision (a), violated the ex post facto clause. Again, the People properly concede this issue. (See *People v. High* (2004) 119 Cal.App.4th 1192.) We accept this concession and shall strike these fines.

III

In supplemental briefing, defendant contends the imposition of the upper term on count 1 violated the proscriptions of *Blakely*. We disagree.

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) *Blakely* held that, for this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 542 U.S. at p. ____ [159 L.Ed.2d at pp. 413-414].)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing the upper term on count 1, the transportation charge, because the court relied upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence.

The contention fails. One of the reasons the trial court gave for imposing the upper term on count 1 is defendant's prior criminal conviction record. (Cal. Rules of Court, rule 4.421(b)(2).) As we have noted, the rule of *Apprendi* and *Blakely* does not apply to a prior conviction used to increase the penalty for a crime. Since one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), the trial court's consideration of other factors, in addition to the prior convictions, in deciding whether to impose the upper term did not violate the rule of *Apprendi* and *Blakely*.

DISPOSITION

The judgment is modified as follows: The sentence for count 2, possession of methamphetamine for sale (Health & Saf. Code, § 11378), is stayed pursuant to Penal Code section 654. The \$170 criminal laboratory analysis fees and the \$510 drug program fees imposed in connection with the conviction for count 2 are also stayed (Health & Saf. Code, §§ 11372.5, subd. (a) & 11372.7, subd. (a)). The remaining laboratory fees and drug program fees should be adjusted from \$170 in laboratory fees and

\$510 in drug program fees to \$135 in laboratory fees and \$405 in drug program fees. The fines imposed pursuant to Penal Code section 1465.7 and Government Code section 70372, subdivision (a), are stricken. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy of the amended abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

_____, BUTZ, J.

We concur:

_____, BLEASE, Acting P. J.

_____, DAVIS, J.